

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

December 29, 1982

Vogel Van and Storage, Inc.  
c/o J. Thomas Vogel, Vice Pres.  
700 S. Pearl St.  
Albany, NY 12202

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Wayne L. Burton  
Nolan & Heller  
60 State St.  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
VOGEL VAN AND STORAGE, INC.	:	DECISION
	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29:	:	
of the Tax Law for the Period March 1, 1974	:	
through November 30, 1977.	:	

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Petitioner, Vogel Van and Storage, Inc., 700 South Pearl Street, Albany, New York 12202, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1974 through November 30, 1977 (File No. 25134).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on March 2, 1981 at 9:15 A.M. Petitioner appeared by Wayne L. Burton, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether a Consent to Fixing of Tax Not Previously Determined and Assessed (ST-580) executed by petitioner finally and irrevocably fixed petitioner's tax liability for the period March 1, 1974 through November 30, 1977, so as to preclude the Audit Division from issuing subsequent assessments for the same period.

II. Whether storage containers, cartons, packing materials and warehouse equipment and supplies are subject to sales and/or use tax.

FINDINGS OF FACT

1. Petitioner, Vogel Van and Storage, Inc. was engaged in providing moving and storage services.

2. On December 18, 1978, as the result of an audit, the Audit Division issued notices of determination and demand for payment of sales and use taxes due against petitioner for the periods March 1, 1974 through August 31, 1977 and September 1, 1977 through November 30, 1977 for taxes due of \$10,666.18 and \$771.68, respectively, plus minimum statutory interest.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1974 through August 31, 1977, to December 20, 1978.

4. On audit, the Audit Division found that petitioner failed to pay a sales or use tax on the following purchases:

expenses	\$92,103.84
fixed assets	24,907.91
cartons and packing material	82,879.00 (intra state)

On September 20, 1978, petitioner executed a Consent to Fixing of Tax Not Previously Determined and Assessed whereby, it agreed to and paid taxes of \$2,554.49, plus interest of \$500.16, for the period March 1, 1974 through November 30, 1977. Said amount represented the tax determined due on expense purchases of \$35,553.84 and fixed assets of \$938.91.

The unresolved portion of the audit consists of tax imposed on purchases of advertising supplies; warehouse equipment, such as dollies, carts, pads and wood storage containers; as well as the cartons and packing materials.

The Audit Division used a nine month test period to determine taxable expense purchases for the audit period. Petitioner agreed to such test and did not contest the audit procedures employed by the Audit Division.

5. The consent referred to above, provides in part, that:

"The undersigned agrees that there is due and payable to the State Tax Commission a sales and/or use tax as detailed below and also agrees that by this consent such tax is hereby assessed and finally and irrevocably fixed in accordance with the provisions of the Tax Law, subject to the approval of the State Tax Commission."

6. On July 28, 1978 petitioner attended a meeting with representatives of the Tax Department for the purpose of discussing purchases held subject to tax on audit. At said meeting, petitioner indicated that it agreed that tax was due on certain purchases. Resolution could not be reached with respect to other purchases. Thereafter, on or about September 20, 1978, the Audit Division delivered a consent to petitioner for the amount of tax verbally agreed to at the foregoing meeting. The notices referred to in Finding of Fact "2" were issued for the balance of the taxes determined due on audit.

7. Petitioner argued that its execution of the consent and its payment of \$3,054.65, in accordance therewith, finally and irrevocably fixed its tax liability for the period March 1, 1974 through November 30, 1977 so as to preclude the Audit Division from issuing an assessment for additional taxes for the same period covered by the consent.

8. The wood containers at issue are used by petitioner to store its customers' household goods and personal effects at its warehouse facility. Said containers are also used to transport the contents and are then returned to the warehouse for re-use. Petitioner charges the customer one amount for storage and collects the applicable tax thereon. The containers at all times remain in the custody of petitioner and it has exclusive control and direction of their use.

9. Petitioner uses cardboard cartons and other packing materials (i.e. newsprint) to pack miscellaneous articles, such as dishes, lamps and wardrobes

for moving. Petitioner charges the customer separately on its invoices for "packing" which includes a charge for cartons. Such charge varies depending on the number and size of the cartons specified by the customer. The cartons are transferred to the customer in conjunction with the moving services. Petitioner does not collect sales tax on packing charges.

10. Petitioner argued that the cartons and packing materials are used and consumed in its transportation and moving services and are an integral and essential component thereof, so much so, that such items cannot be practically distinguished from the moving service. Thus, petitioner concluded that the transfer of the cartons to the customer was nothing more than the transfer of a part of services which are not subject to tax.

#### CONCLUSIONS OF LAW

A. That the consent referred to in Finding of Fact "4" was not approved by the State Tax Commission as full satisfaction of the tax deficiency determined due by the Audit Division for the period March 1, 1974 through November 30, 1977. Therefore, said consent did not finally and irrevocably fix petitioner's tax liability at the amount shown thereon within the meaning and intent of section 1138(c) of the Tax Law, so as to preclude the Audit Division from assessing the balance of the taxes determined due for said period. Petition of Howard Schneider & Charles Schneider d/b/a Schneider and Schneider, New York State Tax Commission Decision, September 21, 1979.

B. That section 1101(b)(4)(i) of the Tax Law defines retail sale as

"(a) sale of tangible personal property to any person for any purpose other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually

transferred to the purchaser of the service in conjunction with the performance of the service subject to tax...".

C. That the storage containers (described in Finding of Fact "8"), expense items and fixed assets were not purchased for "resale" within the meaning and intent of section 1101(b)(4)(i)(A) or (B) of the Tax Law; that said purchases are used by petitioner in providing moving and storage services and therefore, constituted retail sales in accordance with section 1101(b)(4)(i) of the Tax Law and are subject to the tax imposed by section 1105(a) of the Tax Law.

D. That the cartons and other packing materials referred to in Finding of Fact "9" were purchased by petitioner for "resale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law; that, petitioner's charge to its customers for such cartons and packaging materials constituted a retail sale of tangible personal property within the meaning and intent of section 1105(a) of the Tax Law. Accordingly, petitioner is liable for the tax required to be collected on such sales pursuant to section 1133(a) of the Tax Law. (The Audit Division asserted a use tax on purchases of cartons and packaging material rather than determining the tax based on sales price; however, for purposes of this decision, it shall be presumed that petitioners cost and selling price were the same.)

E. That the petition of Vogel Van and Storage, Inc. is denied and the notices of determination and demand for payment of sales and use taxes due issued December 18, 1978 are sustained.

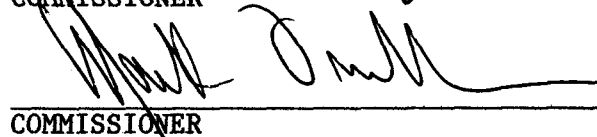
DATED: Albany, New York

STATE TAX COMMISSION

DEC 29 1982

PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Vogel Van and Storage, Inc.

for Redetermination of a Deficiency or a Revision  
of a Determination or a Refund of Sales & Use Tax  
under Article 28 & 29 of the Tax Law for the  
Period 3/1/74-11/30/77.

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Vogel Van and Storage, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vogel Van and Storage, Inc.  
c/o J. Thomas Vogel, Vice Pres.  
700 S. Pearl St.  
Albany, NY 12202

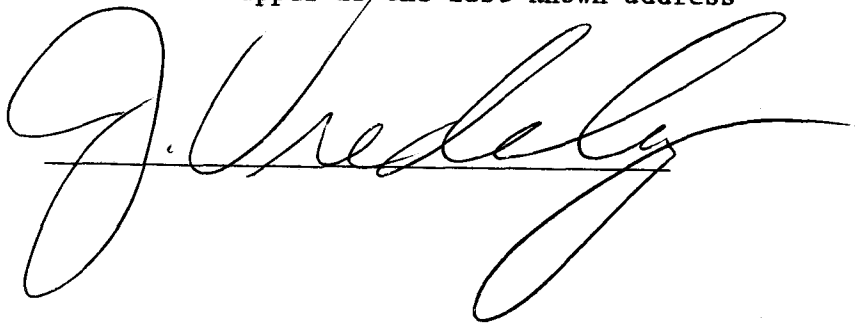
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
29th day of December, 1982.

*Kathy Pfaffenbach*

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174







**P 230 844 345**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		Wayne L. Burton	
STREET AND NO.		Wolau + Holler	
P.O., STATE AND ZIP CODE		60 State St Albany N.Y. 12202	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

**P 230 844 344**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		Uogel UAW Storage Inc	
STREET AND NO.		700 S. Pearl St	
P.O., STATE AND ZIP CODE		Albany N.Y. 12202	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			